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No. 06-989

Supreme Court, U.S.
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In The

Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

Petitioner,

vs.

MATTEL, INC., *et al.*,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Landlord Hall Street found contamination on its property from chemicals spilled many years before by a prior owner. Rather than sue that owner, the landlord sued its tenant Mattel, which never used the chemicals, for the property damage and indemnity. Later, Hall Street sold its property for $5.4 million without informing the court. It then distributed all of its assets to avoid paying the judgment now pending against it. The questions presented are:

1. Should the Court grant certiorari when the result would have been the same under the expanded standard of judicial review requested by the landlord?

2. Can this Court review the arbitrator's finding of fact regarding the intent of the parties to the lease when Hall Street did not appeal the findings of fact nor lodge the evidence from the arbitration with the district court?

3. Should the Court grant discretionary review to an empty shell corporation that has not complied with the orders and judgment of the lower courts?

STATEMENT PURSUANT TO RULE 29.6

Mattel, Inc. ("Mattel") is a Delaware corporation with no parent corporation. No publicly held company owns 10% or more of Mattel's stock.

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OPINIONS BELOW

Hall Street's statement of the opinions below contain the following omissions: The district court entered judgment against Hall Street on May 21, 2001, regarding its claims that the tenant improperly terminated its lease. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 145 F. Supp. 2d 1211 (D. Or. 2001). Hall Street appealed and the Ninth Circuit affirmed the district court on this issue. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, No. 03-35525, No. 03-35526, 2004 U.S. App. LEXIS 23993 (9th Cir. Nov. 16, 2004) (unreported). Hall Street sought *en banc* review, which was denied by an order dated January 4, 2005 (unreported).

The district court entered judgment against Hall Street for $1.23 million on February 26, 2007. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, No. 00-355-JO, 2007 U.S. Dist. LEXIS 14128 (D. Or. Feb. 26, 2007) (unreported).

COUNTERSTATEMENT OF THE CASE

Hall Street's Property: The landlord's Property was formerly owned by GAF Corporation and Sawyers, Inc. (ERA 94; ERA 68, FF ¶¶ 3-10.)[1] They contaminated the Property with chemicals including trichloroethylene

[1] Excerpts of Record in the 2005 appeal are abbreviated as "ERA" to distinguish them from Excerpts of Record in the 2003 appeal, which are abbreviated as "ER." Findings of Fact and Conclusions of Law by the arbitrator in this case are abbreviated as "FF" and "CL" respectively. The abbreviations "1Op," "2Op," and "3Op" are to the district court's May 21, 2001, findings and conclusions (Docket No. 50), April 29, 2002, opinion (Docket No. 82), and May 1, 2003 opinion (Docket No. 104) respectively. The abbreviations "1FF," "2FF," "1CL," and "2CL" are used to indicate when ER cites are to the findings of fact and conclusions of law from the first (Docket No. 66) and second (Docket No. 84) arbitration proceedings.

("TCE"). (ERA 96; ERA 74, FF ¶ 22.) No subsequent occupant used TCE. (ERA 96; ERA 74, FF ¶ 22.)

In 1981, GAF sold the property to View-Master International Group (a partnership). (ERA 94; ERA 68, FF ¶ 7.) In 1983, View-Master sold the Property and the other parcels it owned to Western International Properties; it continued to lease the Property. (ERA 94; ERA 68, FF ¶ 9.)

Western International sold the Property to John Eyler in 1985. (ERA 94; ERA 68, FF ¶ 10.) Mr. Eyler formed a partnership, Cascade Square Associates, and conveyed the Property to it. (ERA 94; ERA 68, FF ¶ 10; ERA 51.) In 1998, Cascade discovered the contamination. It formed Hall Street Associates and conveyed the Property to it for the purpose of shielding Cascade's principals from liability. (ERA 50-51, 294-95.)

The Lease: Cascade had entered into a series of leases with successive tenants, including View-Master International Group, Inc., a corporation, in 1985 (ERA 94-95; ERA 68-69) and View-Master Ideal Group, Inc. in 1991 (ERA 95; ERA 69, FF ¶ 16; ERA 178-210).

In 1997, View-Master Ideal Group merged with Tyco Toys. Mattel merged with Tyco in 1997 and assumed the lease. (ERA 95; ERA 68, FF ¶ 12; ERA 233-34.)

The lease at Sections 12(c) and 13(a) expressed the parties' agreement that the tenant would not be responsible for environmental problems it did not cause. Those provisions provided that "[t]o the extent Tenant has been in compliance with applicable environmental laws, Tenant shall not be held liable following the expiration of this Lease term for . . . the removal and disposal of any hazardous waste on the Premises . . . or other liability . . .

which has not been caused directly or indirectly by the acts of Tenant or View-Master Ideal Group, Inc." (ER 119-21, 2FF ¶¶ 22(f, h); ER 206-10.)

Under Section 13 of the lease, the tenant is responsible only for its own activities by allocating any defense costs sought by the landlord "based on Tenant's actual contribution to the damages." (ER 120, 2FF ¶ 22(h); ER 180, 3Op 19; ER 209.)

Under Section 20, the tenant is responsible only to return the Property in the condition it was leased, not in an improved condition. (ER 121, 2FF ¶ 22(i); ER 217-18.) All of the TCE contamination existed before the lease.

GAF Agrees to Cleanup: When the contamination was discovered in 1998, GAF and Mattel entered into a consent order with the Oregon Department of Environmental Quality ("DEQ"). (ERA 96; ERA 75, FF ¶ 29.) GAF agreed to take over the lead role for responding to the contamination. (ERA 96; ERA 75, FF ¶ 29.) In October 2001, DEQ issued its remediation plan and GAF undertook the investigation and cleanup activities. (ERA 97; ERA 75-76.) Hall Street has reserved its claims against GAF for causing the contamination. (*See* Arbitration trial testimony of Robert Hibbs, December 12, 2001 (Docket #135), pp. 184-88.)

The Water System: Hall Street owned the water system on the Property and leased it to its tenants. (ERA 95; ERA 69, FF ¶ 16; ERA 178-79.) The landlord provided a covenant of quiet enjoyment that the Property was suitable for its intended use. (ERA 203.)

The Oregon Drinking Water Quality Act obligates the owner and operator of a public water system to test the water

for contaminants. Or. Rev. Stat. §§ 448.115(12), 448.131; Or. Admin. R. §§ 333-061-0020(150), 333-061-0036. The parties were unaware of the application of the term "public water system" to the well; neither tested the water for TCE until 1998. (ERA 74, FF ¶ 25.)

Procedural History: In May 2001, Mattel terminated the Lease. (ERA 95; ERA 69, FF ¶ 14.) Hall Street sued Mattel to prevent termination and added claims for property damage and indemnity related to the contamination. The district court bifurcated the issues. (ERA 32.) After trial, the court granted judgment to Mattel on the lease termination issue. (ERA 42-48.) The district court ordered the parties to mediate all remaining issues. (ERA 53.) When mediation was unsuccessful, the parties agreed to arbitration. (ERA 54-64.)

Arbitration Decision for Mattel: The arbitrator conducted a full evidentiary hearing. He heard witnesses, reviewed documentary evidence and briefing, conducted a site tour, and prepared an extensive set of findings of fact and conclusions of law. (ERA 65-84.) The arbitrator rejected all of Hall Street's claims on January 2, 2002. (ERA 65-84.) He held that the tenant did not use TCE and "*as far as the Lease was concerned*" did not violate any environmental law "applicable" to the release of TCE and the resulting damage:

> Mattel, Tyco, and View-Master have been in compliance with the applicable environmental laws with respect to TCE and, therefore, the exception to liability under Sections 12 and 13 have been met. They did not use TCE and their actions have not been shown to have resulted in additional TCE contamination. Their failure to test for, or otherwise discover, the TCE

> contamination does not constitute a violation of "applicable environmental laws" regarding TCE.
>
> (ER 082, 1CL §5.)

Hall Street also presented no evidence of diminution of value or the condition of the property at the time of its purchase. (ER 082, 1FF §41.)

The arbitration agreement required that any request for review of the arbitrator's decision had to be made within 15 days of that decision. (ERA 57.) After the 15-day period expired, Mattel requested that the district court enter judgment. (ERA 101.) The district court denied Mattel's request and allowed Hall Street to file an untimely request for judicial review of the arbitrator's decision. (ERA 101; ERA 104.)[2]

Hall Street did not lodge the arbitration record with the district court and did not seek review of the arbitrator's findings of fact. Rather, it has asked the court to reverse the arbitral decision as a pure matter of law. (ERA 100.)

The District Court's Remand to the Arbitrator: After briefing by the parties, the district court vacated the arbitrator's decision on April 29, 2002. (ERA 96; ERA 107;

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[2] The Arbitration Agreement provided that "[t]he arbitrator shall decide the arbitration on or before December 30, 2001, and issue written findings of fact and conclusions of law. Any request for review of the arbitrator's decision will be made by motion to Judge Jones and filed within 15 days of the arbitrator's ruling." (ER 057.) The district court had earlier confirmed these conditions by its order dated October 23, 2001. (ER 054-64.) Hall Street did not request review of the arbitration decision by the deadline, then waited until Mattel's request to the district court to enter judgment against it before seeking relief from its default. (ER 101, 2Op 10.)

ERA 109.) It remanded the case to the arbitrator to make additional findings consistent with its decision. (ERA 110-11.)

On September 3, 2002, the arbitrator made supplemental findings of fact as directed by the district court and consequently made an award on the indemnity issue to Hall Street in addition to attorney fees and costs. (ERA 114-37.) Both parties sought judicial review of the arbitrator's supplemental findings. Mattel lodged the arbitral record to support its request. Hall Street sought a larger damage award.

On May 1, 2003, the district court vacated in part the arbitrator's supplemental findings of fact and conclusions of law. The court made certain new findings of fact and conclusions of law then entered judgment for Hall Street on the indemnity claim. The district court also affirmed the award of attorneys' fees and costs to Hall Street as the sole prevailing party.

Appeal to the Ninth Circuit: Hall Street appealed the district court's judgment on the lease termination issue, and Mattel appealed on the indemnity issue. That Court rejected Hall Street's appeal and granted Mattel's appeal. It remanded this case with orders to enter judgment for Mattel unless the district court found grounds under the Federal Arbitration Act ("FAA") (9 U.S.C. §§ 10, 11) to vacate, modify or correct the arbitrator's first decision. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, No. 03-35525, No. 03-35526, 2004 U.S. App. LEXIS 23993 (9th Cir. Nov. 16, 2004) (unreported). Hall Street filed a petition for rehearing *en banc*, which was denied.

Remand to the District Court: In February 2005, the district court sent a letter to both parties indicating its "intent to confirm the original arbitration award" and

enter judgment for Mattel. (ERA 271-72.)[3] The court granted Hall Street the opportunity to submit any written objections to confirmation and two extensions of time for its submittal. (ERA 271-72.)

On March 25, 2005, Hall Street filed its objections and a brief. (ERA 326.) On April 1, 2005, Mattel wrote the court stating that Hall Street's objections failed to meet the standard set forth in the remand order and requested permission to file a response to Hall Street's brief. (ERA 273.)[4] On April 11, 2005, the court entered a minute order that Hall Street's objections were under advisement without allowing Mattel to file a response. (ERA 274.)

Judgment on Remand: The district court did not follow the remand order. With briefing only from Hall Street, the district court adopted Hall Street's argument that the arbitral decision was "implausible," vacated the arbitration award and entered judgment for Hall Street. (ERA 275-89.)[5] The court awarded Hall Street additional attorneys' fees and costs. (ERA 306-10.)

Second Appeal to the Ninth Circuit: On August 1, 2006, the Ninth Circuit reversed the district court, holding that "implausibility" is not a ground for reversal of an arbitral decision under the FAA. *Hall St. Assocs. v. Mattel,*

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[3] This letter does not appear on the court's docket but is included chronologically in the Excerpts of Record at tab "D."

[4] This letter does not appear on the court's docket but is included chronologically in the Excerpts of Record at tab "E." The district court's June 30, 2005, Opinion and Order indicates that Mattel "responded" to Hall Street's objections. (ERA 276.) The court appears to be referring to Mattel's April 1, 2005, letter.

[5] The judgment is misdated; it appears to reflect the year of the original district court judgment for Hall Street.

Inc., No. 05-35721, No. 05-35906, 2006 U.S. App. LEXIS 19527 (9th Cir. Aug. 1, 2006) (unreported). The Ninth Circuit remanded the case to the district court with instructions to enter judgment and an award of attorney fees and costs to Mattel. Hall Street again filed a petition for rehearing *en banc* which was denied. Hall Street argued only for the "implausibility" standard. None of the arguments raised in its certiorari petition appear in these briefs before the Ninth Circuit.

District Court Enters Judgment Against Hall Street: The district court received briefing and entered judgment for a reduced $1.25 million fee award against Hall Street on February 26, 2007. The district court granted all of Hall Street's arguments for reduction. Hall Street filed another appeal to the Ninth Circuit.

Hall Street Disposes of Its Only Asset: In September 2004, Hall Street sold the Property, its only asset, for $5.4 million. (ERA 296-305.) Hall Street did not disclose its transfer in its briefing before the Ninth Circuit or the district court on remand. *See* Hall Street's Objections to Confirmation of Original Arbitration Award on Remand, and Hall Street's motion for an award of supplemental attorneys' fees (CR 150, 159); Fed. R. Civ. P. 26(e) (continuing obligation to make material disclosures).

When challenged with this fact in the district court and Ninth Circuit, Hall Street declined to disclose the whereabouts of the $5.4 million. Following its unsuccessful appeals, Hall Street sought to stay the entry of an award of attorneys' fees and costs against it. The Ninth Circuit considered Hall Street's unexplained asset transfers and refusals to disclose the whereabouts of the proceeds of the sale. It imposed a $400,000 bond requirement on Hall

Street as a condition of a stay. Hall Street failed to post this bond. Hall Street continues to withhold information regarding its status and standing to bring its petition before this Court.

REASONS TO DENY THE PETITION

I. SUMMARY

This landlord-tenant case presents a record that does not merit review by this Court. Hall Street states that the issue is whether private parties can expand the scope of judicial review of an arbitral decision. But it fails to accurately and clearly disclose the basis for its lawsuit. Hall Street asks this Court for an order that its tenant pay to improve conditions that existed before it purchased the property. Hall Street took no cleanup action and sold the property with no showing of diminution of its value. Even if expanded judicial review were allowed as Hall Street requests, the result would be the same judgment against it.

Moreover, Hall Street presents an insufficient record to reverse the arbitral decision. Hall Street does not attack the arbitral findings of fact. The arbitrator heard the evidence and determined the credibility of the witnesses regarding the intention of the parties to the lease. His factual determination that, for purposes of the lease, the parties intended that the tenant not be responsible for contamination that existed prior to the tenancy was correct. His findings also reflect Hall Street's failure to show any damage from the contamination. Those findings are not challenged here.

The arbitrator's findings were supported by an extensive record. Hall Street did not lodge the record with the district court. The reviewing court did not consider it.

Moreover, there has been exhaustive review of Hall Street's claims, through two rounds of arbitration, a district court trial, two hearings to reverse the arbitral decision, two Ninth Circuit appeals, two *en banc* petitions and two proceedings on remand. Yet Hall Street only briefly mentions the points appearing in its petition for certiorari in its first *en banc* petition. Those points were never fully presented to the lower courts and appear for the first time here.

Beyond these infirmities in the record, Hall Street petitions the Court with unclean hands. It is an empty corporate shell that has transferred all its assets. Hall Street has no operations other than to serve as a front for the real parties in interest. It disobeys the orders and judgment of the lower courts while it asks this Court to grant certiorari.

II. THE PETITION SHOULD BE DENIED BECAUSE EVEN IF EXPANDED JUDICIAL REVIEW WERE APPLIED, THE ARBITRAL DECISION WOULD BE AFFIRMED AS CORRECTLY DETERMINING THE INTENT OF THE PARTIES

Even if the arbitration decision were reviewed *de novo* for errors of law, it would stand. This Court's review of the right of private parties to expand the scope of judicial review of an arbitral decision should therefore await an appropriate case in which the plaintiff's claim could be legitimately redressed by the Court's decision.

In this case, the arbitrator made findings of fact that the parties to the lease did not intend that the tenant be obligated to indemnify the landlord for damage that the tenant did not cause; the damage was caused by a chemical the tenant did not use and occurred before the landlord owned the property. (ERA 81-83.) The Ninth Circuit concluded that this decision was neither irrational nor does it manifestly disregard the law under 9 U.S.C. §§ 10, 11. Nor was it an error of law. The arbitrator was the finder of fact and in the best position to determine the intent of the parties to the Lease.

A. The Arbitrator Correctly Made Findings of Fact Regarding the Intention of the Parties

The first arbitration decision provides a detailed analysis rejecting each of Hall Street's claims that Mattel caused or exacerbated the contamination either by its own operations or because they did not test the Property. (ERA 82-83.) In the prior appeal, Hall Street confirmed that the Property was contaminated with TCE before its purchase, and Mattel contributed nothing to this contamination. (ERA 246.)

GAF is cleaning up the Property. Hall Street sold it with no showing of damage. Yet Hall Street persists in demanding payment from its tenant. It points to Sections 12 and 13 of the lease that "[t]o the extent Tenant has been in compliance with applicable environmental laws . . . Tenant shall not be held liable following the expiration of this Lease term for . . . the removal and disposal of any hazardous waste on the Premises. . . ." (ERA 188; ERA 190-91.)

The arbitrator reviewed the full record and concluded that the parties intended that "applicable environmental law" for purposes of the indemnity provision means a law "applicable" to the claim for damage caused by TCE. The arbitrator concluded that tenants did not use TCE and therefore were in compliance with the "applicable environmental laws" as that term was intended to be interpreted by the parties. (ERA 82.)

The arbitrator further found that the tenant's failure to test the well water for contaminants may constitute a violation of other laws, but does not constitute a violation of "applicable environmental laws" regarding TCE damage to the Property. (ERA 82.) Testing the water after the TCE was already released would not protect the landowner from the property damage that had already occurred. The arbitrator held that "*as far as the Lease is concerned*, these health provisions are designed to protect a specific type of injury, *i.e.*, health injury to people from drinking water, and are not designed to protect landowners from having their property protected from environmental contamination." (ERA 82-83.) (Emphasis added.) (The district court omitted the italicized phrase from its opinion).

In making his decision, the arbitrator properly analyzed the intent of the parties to the lease. In any contract case, the goal is to give effect to the intention of the contracting parties. *Anderson v. Jensen Racing, Inc.*, 324 Or. 570, 575-76, 931 P.2d 763, 765 (1997) (citing *Inv. Serv. Co. v. Smither*, 276 Or. 837, 843, 556 P.2d 955 (1976) and Or. Rev. Stat. § 42.240 (in construction of a written instrument the intention of the parties is to be pursued if possible)).

The arbitrator's decision is also consistent with the other terms and recitals of the Lease:

- The term "applicable law" was connected in Lease Section 5(b) to the use of the Property and the discharge of hazardous materials. (ER 118, 2FF ¶ 22(a); ER 200).

- The phrase "to the extent" created a limitation on the subsequent words. *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 104-05 (1993); *Or. Account Sys., Inc. v. Greer*, 165 Or. App. 738, 744-45, 996 P.2d 1025, 1029 (2000).

- Section 13 of the Lease provided that the tenant would be responsible only for its own activities and those of its predecessors-in-interest by allocating any defense costs sought by the landlord "based on Tenant's actual contribution to the damages." (ER 120, 2FF ¶ 22(h); ER 180, 3Op 19; ER 209.)

- Under Lease Section 20, the tenant was only required to return the Property in the condition it was leased, not in an improved condition. (ER 121, 2FF ¶ 22(i); ER 217-18.)

- The landlord promised the Property was suitable for the tenant's use in Lease Section 33(h). (ER 122, 2FF ¶ 22(l); ER 222.) *Cantua v. Creager*, 169 Or. App. 81, 96, 7 P.3d 693, 702 (2000) (covenant of quiet enjoyment breached by any act or omission of a landlord that renders the premises substantially unsuitable for the purpose for which they are leased, or that seriously interferes with the beneficial enjoyment of the premises) (citations omitted); *see also Marchese v. Standard Realty & Dev. Co.*, 74

Cal. App. 3d 142, 146, 141 Cal. Rptr. 370, 372 (1977) (interference with tenant's water supply breaches covenant of quiet enjoyment).

- The recitals to the lease, in five places, limited the tenant's indemnity to the landlord to "*its* actions." (ER 117-18, 2FF ¶ 21; ER 197.)[6]

Contract provisions must be read as a whole with the other parts of the Lease and in the context of the parties' dealings to give a reasonable meaning to its terms. *Layman v. Combs*, 994 F.2d 1344, 1352 (9th Cir. 1992); *Holloway v. Holloway*, 63 Or. App. 343, 346-57, 663 P.2d 798, 799-800 (1983).

Hall Street failed to appeal any finding of fact made by the arbitrator. It did not bring the arbitral record before the district court in seeking to vacate the award. Hall Street has never disputed that only the arbitrator, not the district court, heard all the evidence regarding the intent of the parties to the lease.

It may be inferred from Hall Street's failure to lodge the arbitral record in the district court that nothing in the record supports its arguments to this Court. Without such support, Hall Street cannot explain how a reviewing court could select its interpretation of the lease, over an arbitral decision supported by the full evidentiary record.

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[6] The landlord submitted no testimony regarding its interpretation of "applicable environmental law." The landlord's three principals, Mr. Hibbs and Mr. Diamond (both real estate lawyers) and Mr. Eyler, either did not remember the negotiations, or declined to provide testimony on the basis of attorney-client privilege. (ER 052, 237, 239-51, 254-56.)

B. Hall Street Did Not Challenge the Arbitral Findings of Fact But Instead Argued That the Arbitrator Erred Solely as a Matter of Law.

Recognizing the lack of evidence supporting its position, Hall Street argued below that its own interpretation of the lease is the only plausible interpretation "as a matter of law" and that it is based on "plain and common sense." (Hall Street Ninth Circuit Brief dated 2/17/06 at 20.) It can point to no testimony or other evidence that the parties intended the lease to be interpreted as Hall Street now contends. There is no reference to the testimony of the parties or any other evidence presented at the arbitration.

Rather, Hall Street argues that the arbitrator erred as a matter of law in deciding that the Oregon water testing laws were not "applicable environmental laws." Hall Street argues that the Oregon water testing law is an "environmental law" that is "applicable" to Mattel. But that makes the term "applicable" surplusage. All environmental laws are applicable to the tenant.[7] Hall Street however reaches its unfair result that the tenant is responsible for all problems no matter how unrelated to its operations, or how inapplicable to the environmental

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[7] Hall Street argued below that, under the arbitrator's reasoning, no law would qualify as an "applicable environmental law" under the lease because no law is designed solely to protect property owners from property damage. That misconstrues the arbitrator's decision. If the tenant caused property damage by spilling a chemical in violation of the law, it would have failed to comply with a law that was applicable to the claim for damages.

laws that protect against the damage claimed by the landlord.[8]

Hall Street wants a tenant who obtains an incorrect air pollution permit to be liable for any defects to its property, from TCE or otherwise, whether caused by a prior owner or a neighbor.[9] Hall Street argues its tenant should be a super insurance company that is responsible to correct all flaws on the property if it does not comply with *any* environmental law, related or not.

Hall Street therefore must ignore the arbitrator's findings of fact regarding the *intent of the parties.* The arbitrator's findings are based upon the business context and the entirety of the facts regarding the negotiations regarding the lease. He found based upon the testimony and evidence that the phrase "applicable" must be read in that context. His finding provides a fair result.

A court could not reverse fact findings *sua sponte* and make new factual findings. A reviewing court must affirm such findings if the evidence is reasonable, even if it is possible to draw two inconsistent conclusions from the evidence; it cannot assess the credibility of witnesses. *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999).

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[8] Section 13 of the lease provided that the tenant would be responsible only for its own activities and those of its predecessors-in-interest by allocating any defense costs sought by the landlord "based on Tenant's actual contribution to the damages." (ERA 190; ERA 164.)

[9] Hall Street conceded at the arbitration that it could not argue that the tenant's failure to comply with an underground storage tank regulation would make tenant responsible for TCE released by a prior property owner. (ERA 237-40.)

The arbitrator was in the best position to discern the intention of the parties, not the reviewing district court. The arbitrator had the full record before him; the court did not. The arbitrator heard all relevant testimony pertaining to this issue; the court did not.[10] No challenge can be raised as a pure issue of law.

III. THE PETITION SHOULD BE DENIED BECAUSE THE ARBITRATOR'S FINDINGS OF FACT DEMONSTRATE THAT HALL STREET FAILED TO ESTABLISH ANY DAMAGES

Expanded judicial review also will not change the arbitral findings regarding Hall Street's failure to prove any compensable damages. The arbitrator found that the Property was contaminated before Hall Street purchased it. (ERA 74, FF ¶ 22.) Hall Street presented no evidence regarding the property condition when the leasehold began. (ERA 77, FF ¶ 41.) Nor did Hall Street show any diminution in property value. Hall Street first proffered then withdrew its only witness (a real estate appraiser) to testify regarding the value of the Property. (ERA 152-53; ERA 236.) It presented no showing of damage either in the purchase or sales price of the Property.

At the hearing before the district court to contest the arbitral decision, Hall Street's counsel Mr. Finn conceded its lack of property damages:

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[10] For example, the evidence in the arbitration shows the landlord initially disagreed with tenant during the lease negotiations, then changed position and agreed at the time of lease signing that tenant would not be responsible for environmental problems it did not cause. (*See, e.g.*, ER 140-41, 145, 149, 277, 287-97.) The landlord proffered no contrary testimony and this evidence was undisputed.

"THE COURT: Is there any evidence that the failure to comply with applicable environmental laws caused any additional property damage?

MR. FINN: Well, there was evidence to that effect. We offered a great deal about that. The arbiter found it was insufficient to reach that conclusion.

THE COURT: Irrespective of any environmental applicable laws, there was no additional property damage?

MR. FINN: That's what he found.

THE COURT: You are bound by that?

MR. FINN: We are."

(ERA 90-91.)

Hall Street also sought indemnity for the cost of defending lawsuits brought against it by the tenant's former employees alleging Hall Street's negligence. But Lease Section 13(a) provides that the tenant is not responsible to indemnify landlord for loss, damage, liability or expense due to landlord's negligence. (ERA 191.)

Hall Street's failure to show its damages is a finding of fact. That finding is not challenged here.

IV. THE PETITION SHOULD BE DENIED BECAUSE HALL STREET DID NOT ADEQUATELY PRESENT ITS ARGUMENTS TO THE LOWER COURTS

The majority of Hall Street's certiorari petition raises arguments it did not present to the lower courts. Hall Street has therefore failed to allow the lower courts properly to review those arguments or to preserve them

for this petition. *See Helvering v. Minn. Tea Co.*, 296 U.S. 378, 380 (1935); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 498 (1937).

V. THE PETITION SHOULD BE DENIED BECAUSE OF HALL STREET'S UNCLEAN HANDS

Hall Street was challenged in both the district court and before the Ninth Circuit to explain the September 2004 sale of its only asset, the property at issue in this case, and the whereabouts of the $5.4 million proceeds. The Ninth Circuit specifically directed the parties to submit supplemental letter briefs upon becoming aware of this issue. In response, Hall Street has repeatedly refused to discuss the transfers. Since those transfers, Hall Street has been an empty corporate shell with no assets and no operations.

The district court entered a judgment against Hall Street in this case for $1.23 million on February 26, 2007. Hall Street did not dispute the lease provisions that require it pay the attorney fees and costs to Mattel as the prevailing party.

Hall Street now appears to have no intention of satisfying its lease obligation. As it admitted to the district court, Hall Street was formed as a limited liability corporation to shield its principal, Cascade, from liability. But the privilege of the corporate form was never intended for the instant purposes.

The Ninth Circuit properly concluded that a supersedeas bond was necessary to ensure that Hall Street does not further dispose of its assets before the final judgment and order. The distribution of Hall Street's

assets and other actions it may have taken to render ineffective any judgment against it warrant denial of its petition. *Cf. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) (equity requires petitioners to act "fairly and without fraud or deceit as to the controversy in issue").

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: April 24, 2007

Respectfully submitted,

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